Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

TYRONE DUFF; LINDA DUFF,
Petitioners,

vs.

RICHARD W. LEWIS, Ph.D.,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

TYRONE DUFF
LINDA DUFF
P.O.Box 2512
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QUESTIONS PRESENTED

1. Whether an action for redress under 42 U.S.C. §1983 can be invoked by purely private conduct alone?

2. Whether there was a cognizable cause of action under color of State law remaining before the district court in the Plaintiff's Section 1983 action after the district court dismissed Defendant, the State of Nevada, with prejudice in its' order, filed July 12, 2001, which pursuant to Nevada Revised Statutes (N.R.S.) the order dismissed all the State Defendants, with prejudice.

3. Whether the district court readjudicated the same cause of action in its order, filed July 12, 2001, in the order and judgment, entered July 8, 2002, granting the State Defendants' motion for summary judgment and again in the order and default judgment, entered January 30, 2004, in the amount of $330,000.00 in favor of the Plaintiff and Western Counseling Services, LLC against Tyrone Duff and Linda Duff (Duff Defendants)?

4. Whether the Ninth Circuit tampered with the administration of justice and committed a fraud upon the court itself when it falsified the district court's order and default judgment by changing it from compensatory and punitive damages to sanctions against the Duff Defendants in the amount of $330,000.00?

5. Whether the Ninth Circuit's Judgment is a product of fraud that arose from its mediation with the other parties and their attorneys of record from March 18, 2004 through January 5, 2005 in the Plaintiff's appeal, in case no. 04-15269, on the district court's order and judgment, entered July 8, 2002 and its order and default judgment, entered January 30, 2004, where the Duff Defendants were precluded from any participation, whatsoever, in their defense by order of the Ninth Circuit?

PARTIES TO PROCEEDING

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Tyrone Duff and Linda Duff; *Defendants/Counter Claimants/ Appellees Cross Appellants*

Richard W. Lewis, Ph.D.; *Plaintiff/Counter Defendant Appellant Cross Appellee*

Elizabeth Richitt, Ph.D., Richard Weiher, Ph.D., David Antonuccio, Ph.D., Louis Mortillaro, Ph.D., Dennis Ortwein, Christa Peterson, Ph.D., State of Nevada, Board of Psychological Examiners which are all *State Defendants* in the lower court (United States District Court, District of Nevada) and are *Appellees/Defendants* in the U.S. Court of Appeals for the Ninth Circuit.

CORPORATE DISCLOSURE STATEMENT

No parties are corporations, Sup. Ct. R. 29.6

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully prays that a writ of certiorari issue to review the memorandum and the judgment of the United States Court of Appeals for the Ninth Circuit in this case, where there is a real need for a uniformity rule of federal law that complies with the Constitution and *"Rule of Law"*.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a – 4a, 9a – 10a) are unpublished. The order of the court of appeals denying rehearing *en banc* (Pet. App. 25a – 26a) is unpublished. The opinions of the United States District Court, District of Nevada (Pet. App. 5a – 8a, 11a – 24a). are unpublished.

JURISDICTION

The memorandum and judgment of the United States Court of Appeals were entered on May 1, 2006. A timely petition for rehearing *en banc* was denied by the United States Court of Appeals for the Ninth Circuit on June 15, 2006. The jurisdiction of this Court is invoked under *28 U.S.C. §1254(1)*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in pertinent part: "nor shall any person . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V

The Sixth Amendment provides in pertinent part: "to be informed of the nature and cause of the accusations . . ." U.S. Const. amend. VI

The Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Title 42, Section 1983 of the United States Code provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . ." 42 U.S.C. §1983.

Nevada Revised Statute 41.031(1) provides in pertinent part: "The State of Nevada hereby waives its immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against natural persons and corporations, except as otherwise provided in N.R.S. 41.032 to 41.038."

Nevada Revised Statute 41.0334(2) provides: "Conditions and limitations on actions: (a) Intentionally caused or contributed to by an officer or employee of the state or any of its agencies or political subdivisions; or (b) resulting from the deprivation of any rights, privileges or immunities secured by the United States Constitution or the constitution of the State of Nevada."

Nevada Revised Statute 41.0337 provides: "State or political subdivision to be named party defendant. No tort action arising out of an act or omission within the scope of his public duties or employment may be brought against any present or former: 1) Officer or employee of the state or of any political subdivision; 2) Immune contractor; or 3) State legislator, unless the state or appropriate political subdivision is named a party defendant under N.R.S. 41.031."

Nevada Revised Statue 641.318 provides: "Immunity of certain persons from civil liability. The board, a review panel of a hospital, an association of psychologist or any other person who or organization which initiates a complaint or assists in any lawful investigation or proceeding concerning the license of a psychologist or the disc line of a psychologist for gross malpractice, repeated malpractice, professional incompetence or unprofessional conduct is immune from any civil action for that initiation or assistance or any consequential damages, if the person or organization acted without malicious intent."

STATEMENT OF THE CASE

Factual Background History

Plaintiff Richard W. Lewis, Ph.D. initial complaint, filed July 16, 1999, for redress under *42 U.S.C. §1983* was stricken in its entirety in the district court order, filed

January 7, 2000, which also granted the Plaintiff thirty (30) days to file an amended complaint that complies with *F.R.C.P. 8(a)(2)*. Plaintiff requested the defendants in writing to forebear from responding to his amended complaint, filed on or about February 7, 2000 because of its deficiencies. The district court intervened after substantial delay and finally the Plaintiff filed his second amended complaint (complaint) on or about October 23, 2000, which reasserted the same subject matter that was stricken in its' entirety in the district court's order, filed January 7, 2000.

Plaintiff's complaint asserts only one (1) claim of *Section 1983* conspiracy to violate his civil rights, which is based upon Mr. Duff's complaint filed against him, August 26, 1993, before the State of Nevada Board of Psychological Examiners (Board) for giving false testimony, July 6, 1993, in Mr. Duff's child custody matter in State Court case no. *D88-1238 Duff v. Duff.*

Plaintiff sued the Duff Defendants under *Section 1983*, where he alleged various members of the Board and members of the Nevada Attorney General's office conspired together to induce Mr. Duff to file his complaint, August 26, 1993, which the Plaintiff claimed was false. Plaintiff alleged the conspiracy was initiated on or about July 14, 1995 that violated his civil rights under color of State law. It is legally impossible for a complaint filed in 1993 to be the basis of a conspiracy that began in 1995.

The Board found the Plaintiff guilty of giving false testimony in his disciplinary hearing held May 20, 1995 and in its Findings of Fact, Conclusions of Law and Order, entered July 20, 1995. Plaintiff was represented by counsel and never appealed the Board's Judgment. Because the Board's Judgment has never been overturned, the Duff Defendants are immune from all civil action under common law and/or redress under *42 U.S.C. §1983* by the Plaintiff, pursuant to *N.R.S. 641.318* arising out of their complaint.

The district court filed its order, July 12, 2001, (Pet. App. 23a) that granted the Nevada Attorney General's office motion, which dismissed Defendant, the State of Nevada, with prejudice from the Plaintiff's *§1983* action. Pursuant to *N.R.S. 41.031, N.R.S. 41.0334(2)(a)(b)* and *N.R.S. 41.0337*, the order dismissed all the State Defendants, with prejudice.

The district court failed to enter its judgment on its order, filed July 12, 2001, that clearly dismissed the Plaintiff's cause of action under color of State law, which dismissed his second amend complaint filed on or about October 23, 2000 for redress under *42 U.S.C. §1983*, in its entirety, including against the Duff Defendants, with prejudice, where a *Section 1983* action is not invoked by purely private conduct alone.

The district court's orders, filed July 23, 2001 and March 18, 2002 denied the Duff Defendants' any discovery, whatsoever, pursuant to *F.R.C.P. 26(b)* including the production of documents, where it held all the Plaintiff's documents in support of his complaint are privileged.

The district court continued to act without a cognizable cause of action remaining in the Plaintiff's *Section 1983* action that was not dismissed with prejudice, in its entirety, in the district court's order, filed July 12, 2001.

The district court readjudicated the same cause of action in its order, filed July 12, 2001, in its order, filed July 5, 2002, (Pet. App. 21a) that denied the Duff Defendants' motion to dismiss the Plaintiff's complaint, with prejudice, for lack of jurisdiction, where it was legally impossible for him to maintain a *Section 1983* action when all the State Defendants were dismissed, with prejudice in the order, filed July 12, 2001.

The district court continued to readjudicated the same cause of action in its order, filed July 12, 2001, in its order (Pet. App. 13a) and judgment (Pet. App. 20a), both entered

July 8, 2002 that granted the State Defendants' motion for summary judgment, dismissing all remaining State Defendants, with prejudice.

The district court's order, entered July 8, 2002, dismissed the Plaintiff's *Section 1983* against all party defendants, including the Duff Defendants, with prejudice, where the order clearly held the Plaintiff failed to allege the deprivation of any federal constitutional right and failed to produce any admissible evidence, whatsoever, that support his one (1) claim of *Section 1983* conspiracy.

Plaintiff filed his notice of appeal before the Ninth Circuit in case no. *02-16612*, August 5, 2002 on the district court's order and on its' judgment, entered July 8, 2002.

The Duff Defendants' filed their notice of appeal before the Ninth Circuit in case no. *02-16558*, August 7, 2002 on, including but not limited to, the district court's order and judgment, entered July 8, 2002.

The district court, with no motions pending before it, filed its "Willingness To Reconsider", September 23, 2002 (Pet. App. 11a) that requested the Ninth Circuit to remand the Duff Defendants back to the district court to proceed with the Plaintiff's *Section 1983* action against them with no State Defendants and no cause of action under color of State law remaining before the district court. The Duff Defendants filed their objection, October 8, 2002 to the district court's "Willingness to Reconsider". The Ninth Circuit order, filed October 16, 2002, (Pet. App. 10a) granted the district court's "Willingness to Reconsider" that remanded the Duff Defendants back to the lower court in the Plaintiff's *§1983* action with no State Defendants.

The Duff Defendants filed their motion for reconsideration, October 24, 2002, of the Ninth Circuits'

order, filed October 16, 2002. The Ninth Circuit denied their motion in its order, filed December 5, 2002, (Pet. App. 9a) that forced them to back into the Plaintiff's *Section 1983*, where the district court's order, filed July 12, 2001 and its order and judgment, entered July 8, 2002 dismissed all State Defendants, with prejudice as the prevailing party.

After the Ninth Circuit remanded the Duff Defendants back in the Plaintiff's *Section 1983*, with no State Defendants, they filed three (3) motions for clarification of what remained before the district court in the Plaintiff's *Section 1983* action that was not dismissed with prejudice in its order, filed July 12, 2001 and its order and judgment, entered July 8, 2002. The district court denied all three (3) motions and set an evidentiary hearing for June 19, 2003, which the Duff Defendants gave prior notification to the court they would not attend, where they were deprived of their procedural due process rights and the right to the equal protection of the laws when the district court deprived them of their *Sixth Amendment Rights* to be clearly informed of the nature and cause of the accusations alleged against them that remained before the district court for trial in order to prepare a defense, where all the State Defendants were dismissed with prejudice as the prevailing party.

The district court's evidentiary hearing, held June 19, 2003 was based entirely on the Plaintiff's affidavit that readjudicated the same cause of action in his initiate complaint, filed July 16, 1999, that was stricken, in its entirety, in the order, filed January 7, 2000, that allege the loss of Western Counseling Services, LLC contract with the State of Nevada and the Plaintiff's forensic business, which are barred by the *doctrine of res judicata* and *the statute of limitation* and are inadmissible in a *Section 1983* action, which creates a separate federal right that is a special statutory claim independent of common law.

The district court entered its order, January 30, 2004, (Pet. App. 5a) granting a default judgment in the amount of $330,000.00 in favor of the Plaintiff against the Duff Defendants, based on his affidavit only, where he alleged loss of a contract between Western Counseling Service, LLC and the State of Nevada and the loss of his forensic business.

The district court's order, entered January 30, 2004, granted a default judgment (Pet. App. 8a) in favor of the Plaintiff against the Duff Defendants for compensatory damages in the amount of $150,000.00 for loss of contract between Western Counseling Services, LLC and the State of Nevada and $30,000.00 for loss of sale of business and $100,000.00 for loss of forensic business and $50,000.00 punitive damages, which the Ninth Circuit changed to sanctions. The district court further held in its order and default judgment in favor of the State Defendants against the Plaintiff. It is legally impossible for the district court to enter a default judgment in the amount of $330,000.00 against the Duff Defendants, only, in the Plaintiff's *Section 1983* action, where it held the State Defendants are the prevailing party.

Western Counseling Services, LLC alleged contract with the State of Nevada and the Plaintiff's lose of his forensic business are common law claims that are barred by the *doctrine of res judicata* and the *statute of limitations* and are inadmissible in a *§1983* action. The Plaintiff asserted only one (1) claim of *§1983* conspiracy to deprive him of his constitutional rights, which the district court held in its order, entered July 8, 2002, he failed to alleged the deprivation of any federal constitutional right and failed to produce any admissible evidence, whatsoever, in support of his claim of *§1983* conspiracy.

Plaintiff filed his notice of appeal, February 11, 2004, on the district court's order and judgment, entered July 8, 2002

and its order and default judgment, entered January 30, 2004 in case no. *04-15269* before the Ninth Circuit.

The Duff Defendants filed their notice of cross appeal, February 12, 2004, on, including but not limited to, the district court's order and judgment, entered July 8, 2002 and its order and default judgment, entered January 30, 2004 in case no. *04-15326* before the Ninth Circuit.

The Ninth Circuit tainted the Duff Defendants' cross appeal, in case no. *04-15326*, in its entirety, where Circuit Mediator Roxane Ashe initiated and conducted mediation in the Plaintiff's appeal, in case no. *04-15269,* with the other parties and their attorneys of record, where she issued nineteen (19) orders from on or about March 18, 2004 through and including January 5, 2005. The mediation included the district court's order and default judgment, entered January 30, 2004 in the amount of $330,000.00 in favor of the Plaintiff against the Duff Defendants. The Duff Defendants were precluded from any participation, whatsoever, in their defense by order of the Ninth Circuit, which clearly deprived them of their rights under color of law, which rights are secured by the *Fifth, Sixth* and *Fourteenth Amendments to the Constitution of the United States.*

The Ninth Circuit entered its Memorandum (Pet. App. 1a) and Judgment, May 1, 2006, (Pet. App. 4a), acknowledging the district court's order, filed July 12, 2001 and its order and judgment, entered July 8, 2002, dismissing all the State Defendants, with prejudice, from the Plaintiff's *§1983* action that rendered it impossible for him to prevail on the merits. The Ninth Circuit changed the order and default judgment, entered January 30, 2004, from compensatory and punitive damages in favor of the Plaintiff against the Duff Defendants to sanctions against them in the amount of $330,000.00 and remanded them back to the district court, again with no State Defendants.

The Ninth Circuit's Orders, Memorandum and Judgment all list Daniel W. Dugan as a Petitioner-Appellee, in which he is not now nor has he ever been a party to the action in this matter.

The Ninth Circuit filed its order, June 15, 2006, (Pet. App. 25a) that denied the Duff Defendants' Petition for Rehearing En Banc, where the district court's order, filed July 12, 2001 and its order and judgment, entered July 8, 2002 and its order and default judgment, entered January 30, 2004 and the Ninth Circuit's memorandum and judgment, entered May 1, 2006, all contradict each other.

REASONS FOR GRANTING THE PETITION

The issues raised in this case are extremely important, where the Ninth Circuit's misconduct violated the Constitution and the *"Rule of Law"* that caused a fraud upon the court itself when it tampered with the administration of justice in a criminal attempt to cover up the district court's misconduct, where its order and default judgment, entered January 30, 2004, held the Plaintiff's *§1983* action was invoked by purely private conduct on the part of the Duff Defendants only. *42 U.S.C. §1983* which governs deprivation of civil rights, creates separate federal right, that is a special statutory claim independent of common law. *Cook v. Cox*, (1973, DC Va.) 357 F. Supp. 120.

The Ninth Circuits' Memorandum, entered May 1, 2006, falsified the district court's order and default judgment by changing the compensatory and punitive damages to sanctions against the Duff Defendants in the amount of $330,000.00, after it discovered it was legally impossible for the Plaintiff to prevail on the merits, where all the State Defendants were dismissed with prejudice as the prevailing party.

I. The District Court Issued Three (3) Final Orders and Two (2) Judgments In the Plaintiff's § 1983 Action

The district court filed its order, July 12, 2001 that dismissed Defendant, the State of Nevada, with prejudice, which pursuant to *N.R.S. 41.031, N.R.S. 41.0334 (2)(a)(b)* and *N.R.S. 41.0337* the order dismissed all State Defendants, with prejudice that dismissed Plaintiff's cause of action under color of State law. Under *42 U.S.C. §1983* provides civil action for deprivation of civil rights. Two elements are necessary for recovery; 1) Plaintiff must prove that Duff Defendant deprived him of his rights, which rights are secured by the "Constitution and Laws" of the United States, and that the Duff Defendants deprived him of this constitutional right "under color of any statute, ordinance, regulation, custom or usage" of any State or Territory; 2) this second element requires that Plaintiff show that Duff Defendants "acted under color of law". *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 26 L.Ed. 2d 142 90 S.Ct. 1598 (1970). Without a cause of action under color of State law, the Plaintiff could not maintain a *Section 1983* action against the Duff Defendants, where the order, filed July 12, 2001, dismissed all the State Defendants, with prejudice, as the prevailing party.

The district court, without entering its judgment, continued to act without subject matter jurisdiction and readjudicate the same cause of action in its order, filed July 12, 2001, in its order and judgment, entered July 8, 2002 that granted the State Defendants' motion for summary judgment. The district court readjudicated the same cause of action in its order filed, July 12, 2001, in over fifty (50) orders and two (2) judgments through and including January 30, 2004 that were all barred by the *doctrine of res judicata.* Under this doctrine, parties are precluded from relitigating the same cause of action which has been finally determined by a court of competent jurisdiction. *Horvath v. Gladstone,* 97 Nev. 594, 596 (1981).

The district court, pursuant to *N.R.S. 41.031, N.R.S. 41.0334(2)(a)(b)* and *N.R.S. 41.0337,* acted without subject matter jurisdiction after filing of its order, July 12, 2001 that dismissed the Plaintiff's cause of action under color of State law for redress under *Section 1983*. Subject matter jurisdiction is the authority of the court to hear and make a determination in a court action, without subject matter jurisdiction, all the orders and judgment issued by the district court are void under law, of no legal force or effect. *In Interest of M.V.*, 288 Ill. App. 3d 300, 681 N.E. 2d 532 (1st Dist. 1997)("Every act of the court beyond that power is void"). A judge's allegation that he has subject matter jurisdiction is only an allegation. *Lombard v. Elmore*, 134 Ill. App. 3d 898, 480 N.E. 2d 1329 (1st Dist. 1985); *Hill v. Daily,* 28 Ill. App. 3d 202, 204, 328 N.E. 2d 142 (1975); inspection of the record of the case has been ruled to be the controlling factor. This undisputably dismissed the Plaintiff's complaint for redress under *42 U.S.C. §1983,* including against the Duff Defendants with prejudice.

The district court held in its order, entered July 8, 2002, held there are no genuine issues of material fact remaining in dispute before the district court for trial when it entered its judgment, July 8, 2002 granting the State Defendants' motion for summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). This establishes the fact Mr. Duff did not file a false complaint against Plaintiff Richard W. Lewis, Ph.D., August 26, 1993 and therefore pursuant to *N.R.S. 641.318* the Duff Defendants were immune from all civil action by the Plaintiff arising from the Board's Judgment, entered July 20, 1995 on the Plaintiff's disciplinary hearing held May 20, 1995, which he nor his attorney appealed and was barred by the *doctrine of res judicata* and *the statute of limitations.* The judge has a duty to continually inspect the record of the case, and if subject matter jurisdiction does not appear at any time from the record of the case, then he has a duty to dismiss the case as

lacking subject matter jurisdiction. Should a judge act in any case in which he does not have subject matter jurisdiction, he is acting unlawfully, *U.S. v. Will*, 449 U.S. 200, 216, 101 S.Ct. 471, 66 L.Ed. 2d 392, 406 (1980); *Cohen v. Virginia*, 19 U.S. (6 Wheat) 264, 404, 5L.Ed. 257 (1821), and without any judicial authority.

II. The Ninth Circuit Remands the Duff Defendants Back In the Plaintiff's Section 1983 Action With No State Defendants

The district court acted without lawful authority and jurisdiction when it filed its "Willingness to Reconsider" before the Ninth Circuit, September 23, 2002, requesting the Ninth Circuit to delete the Duff Defendants from its order and vacate its judgment, entered July 8, 2002, remanding the Duff Defendants back with no State Defendants in the Plaintiff's *Section 1983* action. In *Frow v. Del Vega*, 82 U.S. 522 (1872), the principle should be applied where the defendants have been alleged only as jointly liable. When two or more obligors are alleged jointly, it means that they are "undivided" and "must therefore be prosecuted in a joint action against them all. *Black's Law Dictionary* 837 (6th ed. 1990). Because the liability cannot be divided, the matter can be decided only in a like manner as to all defendants. Therefore, if one is liable, then all must be liable, and if one is not liable, then all are not liable. *Harlow v. Voyager Communications V, Inc.*, 127 N.C. App. 623, 492 S.E. 2d 45 (1997).

This is specifically so in the Plaintiff's *Section 1983* action where the only defendants are State Defendants and Duff Defendants. The essential elements for establishing a claim for damages under the *Civil Right Act (42 U.S.C. §1983)* are "conduct complained engaged in under color of state law, and that such conduct subjected the plaintiff to the deprivation of rights, privileges or immunities secured by

the Constitution of the United States." *Haldane v. Chagnon*, 345 F.2d 601, 603 (9th Cir. 1965) (citation omitted, emphasis added). The "color of state law" requirement is the equivalent of the "state action" element of the *Fourteenth Amendment*; thus, *section 1983* is not invoked by purely private conduct. *Briley v. State of California*, 564 F.2d 849 (9th Cir. 1977). (Emphasis added).

The Plaintiff asserted only one (1) claim of *§1983* conspiracy to deprive him of his civil rights under color of State law, which he failed to allege the deprivation of any federal constitutional right and failed to produce any admissible evidence, whatsoever, that would support his claim of *§1983* conspiracy. The primary inquiry in a *Section 1983* analysis is whether the Plaintiff has articulated a Constitutional right giving rise to a claim under this statute. *Baker v. McCollan*, 443 U.S. 137, 140 (1979). Therefore, a conspiracy, even if established by a plaintiff, will not give rise to *§1983* liability unless the plaintiff can show an actual deprivation of constitutional rights. *Woodrum v. Woodward County, Oklahoma*, 866 F.2d 1121, 1126 (9th Cir. 1989).

The district court denied all three (3) motions filed by the Duff Defendants for clarification of what remained before the district court that was not dismissed in the Plaintiff's *Section 1983* action. This deprived the Duff Defendants of their procedural due process rights and their right to the equal protection of the laws that undisputably deprived them of their *Sixth Amendment Rights*, which guarantees a . . . defendant the fundamental right to be clearly informed of

the nature and cause of the charges in order to permit adequate preparation of a defense. *Sheppard v. Rees*, 909 F.2d 1234, 1236 (9th Cir. 1990). The notice provision of the *Sixth Amendment* is incorporated within the Due Process Clause of the *Fourteenth Amendment* and is full applicable to the States. *Gray v. Raines*, 662 F.2d 569, 571 (9th Cir. 1991).

The district court entered its order and default judgment, January 30, 2004, awarding compensatory damages in the amount of $280,000.00 and punitive damages in the amount of $50,000.00 in favor of the Plaintiff against the Duff Defendants only and further ordered that the default judgment be entered in favor of the State Defendants against the Plaintiff. It is legally impossible for the district court to enter a default judgment in the amount of $330,000.00 against the Duff Defendants and at the same time hold the State Defendants as the prevailing party in the Plaintiff's *Section 1983* action. As the Supreme Court explained in *Frow v. De La Vega*, 82 U.S. 552, 554 (1872),

> "If the court [in a case alleging joint fraud] can lawfully make a final decree against one defendant separately, on the merits, while the cause was proceeding undetermined against the others, then this absurdity might follow; there might be one decree of the court sustaining the charge of joint fraud committed by the defendants; and another decree disaffirming the said charge, and declaring it to be entirely unfounded, and dismissing the complainant's bill . . Such a state of things is unseemly and absurd, as well as unauthorized by law."

The Duff Defendants filed four (4) motions to dismiss in this matter, where there was clearly no subject matter jurisdiction remaining before the district court in the Plaintiff's *§1983* action after it filed its order, July 12, 2001, which the district court denied. The Duff Defendants' conduct in this matter, in exercising their federal constitutional rights, was neither dilatory nor was their approach to this action feckless. *In re First T.D. & Investments, Inc.*, 253 F.3d 520, 532 (9th Cir. 2001)(citing *Frow v. De La Vega*, 82 U.S. 522 (1872), "[it] would be incongruous and unfair to allow [the plaintiff] to collect a half million dollars from [the defaulting defendants] on a contract that a jury found was breached by [the plaintiff]."

III. The Ninth Circuit's Memorandum and Judgment Contradicts the District Court's Order, Filed July 12, 2001, Its Order and Judgment, Entered July 8, 2002 and Its Order and Default Judgment, Entered January 30, 2004

The Ninth Circuit's Memorandum and Judgment, entered May 1, 2006, failed to address the issues the Duff Defendants raised on appeal but acknowledges it was legally impossible for the Plaintiff to prevail on the merits in his *Section 1983* action against the Duff Defendants after the district court dismissed all the State Defendants, with prejudice in its order, filed July 12, 2001 and again in its order and judgment, entered July 8, 2002.

Therefore, the Ninth Circuit's Memorandum held the district court lacked jurisdiction over the parties and the subject matter for the issuance of its order and default judgment, entered January 30, 2004. If the record of the case does not support subject matter jurisdiction, then the judge has acted without subject matter jurisdiction. *The People v. Brewer*, 328 Ill. 472, 483 (1928)("If it could not legally hear the matter upon the jurisdictional paper presented, its findings that it had the power can add nothing to its authority, - it had no authority to make that finding.")

Where the district court lacked jurisdiction over the parties and the subject matter for the issuance of its order and default judgment, entered January 30, 2004, the Ninth Circuit lacked the inherent power to change it from compensatory and punitive damages to "sanctions" against the Duff Defendants in the amount of $330,000.00 for exercising their federal constitutional rights. The United States Supreme Court held that no sanction or penalty shall be imposed upon one because of his exercise of constitutional rights. *Spevack v. Klein*, 385 U.S. 511, 87 S.Ct. 625 (1967); *Garrity v. New Jersey*, 385 U.S. 493, 87

S.Ct. 616 (1967); *Boyd v. United States*, 116 U.S.616, 6 S.Ct. 524 (1886); *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489 (1964); *Sherar v. Cullen*, 481 F.2d 945 (1973).

The Ninth Circuit acted where it lacked the inherent power to act and change the district court's order and default judgment from compensatory and punitive damages to sanctions, which if imposed by the district court would be in the form of an order not a default judgment that would be payable to the court, not the Plaintiff. The court first must look to the record as the determining factor in this matter, if an order for sanction doesn't appear on the docket sheet, then sanctions were not raised before the district court below and the presiding judge is acting without subject matter jurisdiction and his/her orders are void under law, of no legal force or effect. *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 497 N.E. 2d 1156 (1986). In determining whether a lack of jurisdiction is apparent from the record, we must look to the whole record, which includes pleadings, the return of the process, the verdict of the jury and the judgment of the court. "Because a court does not acquire jurisdiction by a mere recital contrary to what is shown in the record", the record of the case is the determinating factor as to whether a court has jurisdiction. *Id.* at 1156

The Ninth Circuit's Memorandum, entered May 1, 2006 held it is legally impossible for the Plaintiff to prevail on the merits after the district court dismissed all the State Defendants, with prejudice in its order, filed July 12, 2001 and its order and judgment, entered July 8, 2002, that contradicts the Ninth Circuit's orders, filed October 16, 2003 and December 5, 2003 that granted the district court's "Willingness to Reconsider" and remanded the Duff Defendants back to the lower court in the Plaintiff's *Section 1983* action, with no State Defendants and no subject matter remaining before the district court. The Ninth Circuit committed the crime of malfeasance when it intentionally

placed the Duff Defendants in a position to be framed with the district court's order and default judgment, entered January 30, 2004 in the amount of $330,000.00, which constitutes racketeering, conspiracy, obstruction of justice, fraud and extortion.

The Ninth Circuit tampered with the administration of justice when it fabricated subject matter jurisdiction in a criminal attempt to falsify the district court's order and default judgment, entered January 30, 2004, that changed the compensatory and punitive damages to sanctions. The Ninth Circuit offered no legal justification to impose sanctions against the Duff Defendants and offered no evidentiary or factual support that sanctions was raised before the District Court below and therefore cannot be raised for the first time in this appeal. *Farhoud v. INS.*, 122 F.3d 794, 796 (9th Cir. 1997). Because sanctions were not raised before the District Court below, the Ninth Circuit is procedurally barred from imposing sanctions against the Duff Defendants with no legal justification that were not raised before the District Court below. *Bousley* v. *United States*, 523 U.S. 614, 621, 140 L.Ed. 2d 828, 118 S.Ct. 1604 (1998). The Duff Defendants' appeal in case no. *04-15326* addressed the district court's order and default judgment as written and issued, not as illegally altered by the Ninth Circuit.

The Ninth Circuit's misconduct caused a fraud upon the court itself, which deprived the Duff Defendants of their procedural due process rights and their right to the equal protection of the laws. "Fraud upon the court" has been defined by the 7th Circuit Court of Appeals to "embrace that species of fraud which does, or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *Kenner v. C.I.R.*, 387 F.3d 689

(1968); 7 Moore's Federal Practice, 2d ed., p. 512, ¶60.23. The 7th Circuit further stated, "a decision produced by fraud upon the court is not in essence a decision at all, and never becomes final."

The Ninth Circuit committed the crime of malfeasance that caused a fraud upon the court itself when it unlawfully changed the district court's order and default judgment, entered January 30, 2004, from compensatory and punitive damages to sanctions against the Duff Defendants in the amount of $330,000.000 after it establish the district court lacked jurisdiction over the parties and the subject matter for there issuance, where its Memorandum clearly held it is legally impossible for the Plaintiff to prevail on the merits when all the State Defendants were dismissed, with prejudice, as the prevailing party.

The Ninth Circuit's Memorandum and Judgment are a product of fraud arising from its illegal mediation. Thus, the "fraud upon the court" doctrine rests on two distinct features. First, as the Tenth Circuit has explained in *Robinson v. Audi Aktiengesellschaft*, 56 F.3d 1259, 1267 (10th Cir. 1995), *cert. denied*, 516 U.S. 1045 (1996), "whatever it embodies, [fraud on the court] requires the showing that one has acted with an intent to deceive or defraud the court." Second, as the Tenth Circuit explained in *Bulloch v. United States*, 763 F.2d 1115, 1118 (10th Cir. 1985)(*en banc*), the deception must go to the heart of the judicial proceeding, creating an impression about the core, operative facts that is relied on by the court and is false. "Fraud upon the court is fraud which is direct to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury . It is where the court or a member is corrupted or influenced or influenced is attempted or where the judge has not performed his judicial function- - - thus where impartial functions of the court have been directly corrupted." *Id.* at 1118.

The Ninth Circuit's order, filed June 15, 2006, denied the Duff Defendants' Petition for Rehearing En Banc. The United States Supreme Court held that this deception demanded the exercise of the courts' equitable power to vacate the judgment of the lower court to prevent a fraud upon the court itself, "[T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot be complacently tolerated consistently with the good order of society." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 251 (1944). The Court emphasized, "This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after discovery evidence, is believed possibly to have been guilty of perjury. Here. . . we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals." *Id* at 245.

IV. Summary

The Duff Defendants have demonstrated herein that the district court and the Ninth Circuit both acted with total disregard of the Constitution and the *"Rule of Law"*, tainting this entire case with racketeering, conspiracy, fraud, obstruction of justice and the extortion of $330,000.00 from the Duff Defendants, where the orders and two (2) judgments issued by the district court and the Memorandum and Judgment issued by the Ninth Circuit are a manifest of injustices, where they contradict each other and unquestionably caused a fraud upon the court itself and the continuing deprivation of the Duff Defendants' rights under color of law, which rights are secured by the Constitution of the United States.

The United States Supreme Court, in accordance with the Constitution and the *"Rule of Law"*, should grant the Duff Defendants' petition for writ of certiorari and vacate the Memorandum and Judgment issued by the Ninth Circuit and all orders and judgments issued by the district court as unconstitutional and void under law, of no legal force or effect to prevent a fraud upon the court itself and the extortion of $330,000.00 from the Duff Defendants and continuing deprivation of their Constitutional and Civil Rights under color of law.

CONCLUSION

The petition for writ of certiorari should be granted, where there is a real need for uniformity rule of federal law in this matter that complies with the Constitution and the *"Rule of Law"*.

Respectfully submitted,

TYRONE DUFF
LINDA DUFF
P.O.Box 2512
Bellingham, WA. 98227
(360)752-1775

APPENDIX

APPENDIX A – MEMORANDUM* OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED AND ENTERED MAY 1, 2006

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-15326
D.C. No. CV-N-99-00386-ECR

DANIEL W. DUGAN,
Petitioner – Appellee,

RICHARD W. LEWIS,
Plaintiff – counter – defendant-Appellee,

v.

DAVID ANTONUCCIO; LOUIS MORTILLARO; NEVADA PSYCHOLOGICAL EXAMINERS BOARD; DENNIS ORTWEIN; CHRISTA PETERSON; ELIZABETH RICHITT;RICHARD WEIHER,
Defendants,

And

LINDA DUFF; TYRONE DUFF,
Defendants – counter – claimants – Appellants.

* This disposition is not appropriated for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appendix A

DECIDED: May 1, 2006

Appeal from the United States District Court
for the District of Nevada
Edward C. Reed, District Judge, Presiding

Submitted April 7, 2006**
San Francisco, California

Before SCHROEDER, Chief Judge, TROTT, Circuit Judge, and RHOADES ***, District Judge.

DECISION

Tyrone Duff and Linda Duff (the Duffs) appeal pro se the district court's default judgment entered in favor of Richard Lewis.

Notwithstanding the Duffs dilatoriness, default judgment was not the appropriate sanction in this case. See In re First T.D. & Investments, Inc., 253 F.3d 520, 532 (9th Cir. 2001). Given the district court's previous orders dismissing the state actors- - rendering it impossible for Lewis to prevail on the merits- - imposing default judgment for the amount of $330,000.00 as a sanction for not participating is incongruous and ultimately excessive. See id. Although a sanction in this case is appropriate, requiring the Duffs to pay $330,000.00 dollars to Lewis proves too much.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed.R.App.P. 34(a)(2).

*** The Honorable John S. Rhoades, Sr., Senior United States District Judge for the Southern District of California, sitting by designation.

Appendix A

We recognize district courts' inherent need to have the ability to curtail dilatory conduct that would slow impermissibly the wheels of justice. We recognize also this district court's need to address the Duffs' feckless approach to this action. However, allowing Lewis to collect nearly a third of a million dollars based on a legal theory that has no potential for success is unreasonable and unfair. Accordingly, we remand the case to the district court for the imposition of a more appropriate sanction against the Duffs and a determination based on the merits.

REVERSED and REMANDED.

APPENDIX B – JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED AND ENTERED MAY 1, 2006

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-15326
D.C. No. CV-N-99-00386-ECR

DANIEL W. DUGAN,
Petitioner – Appellee,

RICHARD W. LEWIS,
Plaintiff – counter – defendant - Appellee,

v.

DAVID ANTONUCCIO; et.al.
Defendants,

And

LINDA DUFF; et.al.,
Defendants – counter – claimants – Appellants.

Appeal from the United States District Court for the District of Nevada (Reno).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada (Reno) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **REVERSED, REMANED.**

Filed and entered 05/01/06

APPENDIX C – ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEVADA ENTERED JANUARY 30, 2004 – Docket No. 320

CASE NO. CV-N-99-0386
HON. EDWARD C. REED, JR.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RICHARD W. LEWIS,
Plaintiff,

v.

LINDA DUFF AND TYRONE DUFF
Defendants,

DATED: January 27, 2004

Present: Edward C. Reed, Jr., Senior U.S. District Judge Courtroom Deputy: Colleen Larsen; Court Reporter: Cathy Worken; Counsel for Plaintiff: Kevin Mirch; Marie Mirch: Counsel for Defendant: None Appearing

MINUTES OF EVIDENTIARY HEARING WITH RESPECT TO DAMAGES:

At 10:09 A.M. Court convenes; defendants are not present, nor represented by counsel.

The Court notes for the record that a document (#319) entitled "Notification to the Court" was filed on January 23, 2004, by defendants, indicating they will not participate in this hearing.

Appendix C

RICHARD W. LEWIS is called by counsel for plaintiff, sworn and testifies.

Argument is presented.

At 11:30 A.M. Court recesses; at 12:20 P.M. Court reconvenes.

The Court makes its findings for the record.

IT IS ORDERED

That damages sought for lost income from the contract of Western Counseling Services and the State of Nevada is found to be $150,000.00. The Court awards, for lost income on the sale of the business, $30,000.00.

The Court finds that doctor Lewis, the Plaintiff, has suffered damages on account of loss of his forensic business, due to the conduct of the Duffs, in the amount of $100,000.00.

The Court finds that plaintiff is not entitled to recover legal fees incurred in the State Court action with the Duffs. Such was not pled in the complaint, and further, the usual practice is that such damages have to be recovered in the action where they were incurred, rather than an independent action.

The Court denies recovery of damages on account of the Duff unpaid invoice, this was not pled in the complaint.

The Court finds an aware of punitive damages, in the amount of $50,000.00, will be made.

Appendix C

The Court finds an award of future damages does not appear to be appropriate.

The Clerk will enter judgment as follows:

In the amount of $280,000.00 for compensatory damages, and in the amount of $50,000.00 for punitive damages, in favor of the plaintiff and against defendants Linda Duff and Tyrone Duff.

In favor of all other defendants in the case, and against plaintiff as to the claims of plaintiff against the defendants other than the Duffs.

At 1:00 P.M. Court adjourns.

LANCE S. WILSON, CLERK

"s/COLLEEN LARSEN"
COLLEEN LARSEN
Deputy Clerk

APPENDIX D – JUDGMENT OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEVADA ENTERED JANUARY 30, 2004 – Docket No. 321

CASE NO. CV-N-99-0386
HON. EDWARD C. REED, JR.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RICHARD W. LEWIS,
Plaintiff,

v.

LINDA AND TYRONE DUFF
Defendants,

DATED: January 27, 2004

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.
IT IS ORDERED AND ADJUDGED

That judgment is hereby entered in the amount of $280,000.00 for compensatory damages, and in the amount of $50,000.00 for punitive damages, in favor of plaintiff, and against defendants Linda Duff and Tyrone Duff.

That judgment is further entered in favor of all of the other defendants in this case, and against plaintiff, as to the claims of plaintiff against the defendants, other than the Duffs.

LANCE S. WILSON, CLERK

"s/COLLEEN LARSEN"
COLLENN LARSEN
Deputy Clerk

APPENDIX E – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT COURT OF APPEALS, FILED DECEMBER 5, 2002

9th Circuit Docket No. 02-16558, 02-16612

D.C. No. CV 99-00386-ECR
District of Nevada, Reno

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD W. LEWIS, Ph.D.,
Plaintiff – Appellant –
Cross Appellee,

vs.

DAVID ANTONUCCIO, et.al.,
Defendants – Appellees –
Cross – Appellants.

Before: FERNANDEZ, GRABER and GOULD, Circuit Judges

Appellants Linda Duff and Tyrone Duff's motion for reconsideration of this court's October 16, 2002 order dismissing these appeals for lack of jurisdiction is denied.

No motions for reconsideration, rehearing, modification, clarification, stay of mandate or any other submission shall be filed or entertained in these closed dockets.

APPENDIX F – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT COURT OF APPEALS, FILED OCTOBER 16, 2002

9th Circuit Docket No. 02-16558, 02-16612

D.C. No. CV 99-00386-ECR
District of Nevada, Reno

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD W. LEWIS, Ph.D.,
Plaintiff – Appellant –
Cross Appellee,

vs.

DAVID ANTONUCCIO, et.al.,
Defendants – Appellees –
Cross – Appellants.

Before: FERNANDEZ, GRABER and GOULD, Circuit Judges

A review of the record demonstrates that this court lacks jurisdiction over these appeals because the order challenged in the appeals is not final or appealed. See Fed.R.Civ.P. 54 (b) (dismissal of fewer than all claims or all parties is not appealable absent certification by the district court). Consequently, these appeals are dismissed for lack of jurisdiction.

APPENDIX G – ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEVADA ENTERED SEPTEMBER 23, 2002 – Docket No. 267

CASE NO. CV-N-99-0386
HON. EDWARD C. REED, JR.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

RICHARD W. LEWIS,

v.

ELIZABETH RICHITT, PhD., et.al.

MINUTES OF THE COURT

DATED: SEPTEMBER 23, 2002
PRESENT: EDWARD C. REED, JR.
U.S. DISTRICT JUDGE
Deputy Clerk: Oma L. Rose
Reporter: None
Counsel for Plaintiff (s): NONE APPEARING
Counsel for Defendant (s): NONE APPEARING

MINUTE ORDER IN CHAMBERS

WILLINGNESS TO RECONSIDER

Upon review of the files in this case, it appears that our order (#232) is incorrect insofar as it ordered that judgment be entered in the action. Our order (#232) grants summary

judgment as to all remaining defendants except for the defendants, the Duffs. It appears that the action has not been terminated as to the defendants, the Duffs. Therefore, our order (#232) should be amended to delete the order to the Clerk to enter judgment. Our order (#232) is otherwise correct. The judgment should be vacated. A copy of this order shall be transmitted by the Clerk of the Court of Appeals in connection with the pending appeal.

LANCE W. WILSON, CLERK

"s/OMA L. ROSE"
OMA L. ROSE
Deputy Clerk

APPENDIX H – ORDER OF THE UNITED STATES COURT, DISTRICT OF NEVADA FILED JULY 5, 2002 AND ENTERED JULY 8, 2002 – Docket No. 232

CASE NO. CV-N-99-0386
HON. EDWARD C. REED, JR.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

RICHARD W. LEWIS, Ph.D.,
Plaintiff,

v.

ELIZABETH RICHITT, PhD., RICHARD WEIHER, DAVID ANTONUCCIO, LOUIS MORTILLARO, DENNIS ORTWEIN, CHRISTA PETERSON, STATE OF NEVADA, BOARD OF PSYCHOLOGICAL EXAMINERS, LINDA DUFF, TYRONE DUFF
Defendants,

I. Background

This case is based upon the complaint filed against Dr. Lewis by Mr. Tyrone Duff arising out of Dr. Lewis's testimony at Mr. Duff's child custody hearings. Dr. Lewis claims that various members of the Nevada Board of Psychological Examiners and members of the Nevada Attorney General's office conspired together to induce Mr. Duff to file his complaint, which Dr. Lewis claims was false. This conspiracy is alleged to have violated Dr. Lewis's civil rights under 42 U.S.C. §1983. The remaining defendants filed a motion for summary judgment (#177) claiming that

Dr. Lewis could not demonstrate any constitutional deprivation, and, therefore, could not state a claim under section 1983. Dr. Lewis opposed (#205) and the defendants replied (#206).

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment allows courts to avoid unnecessary trials where no material factual dispute exists. Northwest Motorcycle Ass'n v. U.S. Department of Agriculture, 18 F. 3d 1468, 1471 (9th Cir. 1994). The court must view the evidence and the inference arising therefrom in the light most favorable to the nonmoving party, Bagdadi v. Nazar, 84 F.3d 1194, 1197 (9th Cir. 1996), and should award summary judgment where no genuine issues of material fact remain in dispute and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Judgment as a matter of law is appropriate where there is no legally sufficient evidentiary basis for reasonable jury to find for the nonmoving party. Fed.R.Civ.P. 50(a). Where reasonable minds could differ on the material facts at issue, however, summary judgment should not be granted. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 116 S.Ct. 1261 (1996).

The moving party bears the burden of informing the court of the basis for its motion, together with evidence demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the party opposing the motion may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts showing that there exists a genuine issue for trial. Anderson v. Liberty

Lobby, Inc. 477 U.S. 242, 248 (1986). Although the parties may submit evidence in an inadmissible form - - namely, depositions, admissions, interrogatory answers, and affidavits - - only evidence which might be admissible at trial may be considered by a trial court in ruling on a motion for summary judgment. Fed.R.Civ.P. 56(c); Beyene v. Coleman Security Services, Inc., 854 F.2d 1179, 1181 (9th Cir. 1988).

In deciding whether to grant summary judgment, a court must take three necessary steps: (1) it must determine whether a fact is material; (2) it must determine whether there exists a genuine issue for trier of fact, as determined by documents submitted to the court; and (3) it must consider that evidence in light of the appropriate standard of proof. Anderson, 477 U.S. at 248. Summary judgment is not proper if material factual issues exist for trial. B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1264 (9th Cir. 1999). As to materiality, only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Disputes over irrelevant or unnecessary facts should not be considered. Id. Where there is a complete failure of proof on an essential element of the nonmoving party's case, all other facts become immaterial, and the moving party is entitled to judgment as a matter of law. Celotex, 477 U.S. at 323. Summary judgment is not a disfavored procedural shortcut, but rather an integral part of the federal rules as a whole. Id.

B. Section 1983

Section 1983 creates a cause of action against a person who, acting under color of state law, deprives another of rights guaranteed under the Constitution. 42 U.S.C. §1983. Section 1983 does not create any substantive rights, rather it is the vehicle whereby plaintiffs can challenge actions by

governmental officials. The primary inquiry in a section 1983 analysis is whether the plaintiff has articulated a Constitutional right giving rise to a claim under this statute. Baker v. McCollan, 443 U.S. 137, 140 (1979). Therefore, a conspiracy, even if established by a plaintiff, will not give rise to section 1983 liability unless the plaintiff can show an actual deprivation of constitutional rights. Woodrum v. Woodward County, Oklahoma, 866 F.2d 1121, 1126 (9th Cir. 1989).

C. Due Process

At the start we make a distinction not made by Dr. Lewis between substantive due process and procedural due process.

Substantive due process involves a challenge to a law on the basis that it is fundamentally unfair. Substantive due process is not implicated in this case. Procedural due process is implicated when a plaintiff has a property right or entitlement that the government seeks to take away. In those cases the plaintiff is entitled to notice and some type of hearing before being deprived of his property right or entitlement. In this case, Dr. Lewis was given notice of the board's actions. He was given a formal hearing, and in the end the board did not deprive him of his license, nor limit his practice in any way. Therefore, even if we were to apply the Matthews v. Eldridge, 424 U.S. 319, 335 (1976) balancing test we would conclude that Dr. Lewis could not state a violation of his procedural due process rights.

D. Other Constitutional Violations

Nonetheless, Dr. Lewis claims that his constitutional rights were violated by a conspiracy to have Mr. Duff file a false claim with the board. Dr. Lewis presents the following

as the conduct that violated his constitutional violations: (1) improper deliberations among board members; (2) incorrect findings of fact and conclusions of law; (3) a violation of the duty to disclose conflicts of interest; (4) prior disclosures which violated due process; (5) failure to follow the proper procedures for holding the disciplinary hearing which violated due process; (6) obstructing a witness; (7) discussions between board members and members from the attorney general's office; (8) deprivation of judicial review by trick which violates due process; and (9) the change of the punishment from a private reprimand to a public reprimand without a hearing in violation of due process. None of these examples state a protected constitutional interest.

The defendants have absolute immunity for all actions taken in their quasi - judicial function as board members. Mishler v. Clift. 191 F.3d 998, 1004 (9th Cir. 1999). Therefore, because actions (1) – (7) were actions taken by the defendants in their role as board members involving the claims against Dr. Lewis, those actions cannot be the basis of a constitutional deprivation. All claims based on those actions are barred by absolute immunity.

Dr. Lewis's alleged deprivation of his rights to appeal by trick does not state a constitutional deprivation. Dr. Lewis was not prevented from filing an appeal. His reasons for chosing not to pursue an appeal are irrelevant. The option for appealing was open to Dr. Lewis and he chose not to pursue it.

Finally, Dr. Lewis cannot base his section 1983 on the allegation that the Psychological Board changed his punishment from a private reprimand to a public reprimand because there is no evidence to support his claim. [1] Pursuant to N.R.S. 641.208 all disciplinary hearings of psychologists are public record. Therefore, Dr. Lewis cannot claim a right to keep private any of the information disclosed at the

hearing. Dr. Lewis did not produce any evidence to demonstrate that his private letter of reprimand was made public.

Dr. Lewis cannot state a deprivation of constitutional rights, and, therefore, cannot maintain a section 1983 claim.

In addition to his failure to state a constitutional violation, Dr. Lewis's claims of conspiracy suffer from two timing problems, and a failure of proof.

First, Mr. Duff filed his complaint with the board in 1993. Dr. Lewis alleges that the conspiracy began in 1995 after he asked for payment from the Division of Child and Family services. There is no way that a complaint filed in 1993 could be the basis for a conspiracy that began in 1995.

The second timing problem is that the only evidence that Dr. Lewis ever asked for payment indicates that payment was requested several months after the disciplinary proceedings were initiated. [2] It is impossible that a demand for payment made after the initiation of an investigation could be the triggering point of an investigation.

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[1] Even if we were to consider the evidence attached to Dr. Lewis's opposition we would find that the board did not change the punishment. The evidence conclusively demonstrates that although the board published the results of the disciplinary hearing in the monthly journal the formal punishment of Dr. Lewis was still a private letter of reprimand. Further, the testimony of Deputy Attorney General Moore establishes that because the board hearings are public meetings the results are often published, even if the formal punishment issued by the board is a "private" letter.

[2] Dr. Lewis's affidavit makes a statement that after he requested payment they resurrected the complaint against him. This statement is not admissible evidence because it does not state any specific facts, only a conclusory allegation.

Appendix H

Dr. Lewis also claims that even though the complaint was filed in 1993 he was cleared of any wrongdoing soon after that complaint was filed. Therefore, Dr. Lewis claims that part of the conspiracy was the revival of the complaint against him. To begin, this is not the basis for Dr. Lewis's complaint. Dr. Lewis's complaint specifically refers only to a filing of a complaint in 1995, not a revival of a past complaint and Dr. Lewis never moved to amend his complaint to add this new basis for liability.

However, even if were to consider the newly proposed theory of liability, there is no evidence presented that indicates that the board completed an investigation of Dr. Lewis and found him to be cleared. Dr. Weiher's deposition is not properly authenticated, see Orr v. Bank of America, 285 F.3d 764 (9th Cir. 2002), and plaintiff presents no other properly authenticated evidence of being cleared from the initial complaint. Therefore, Dr. Lewis has not produced any admissible evidence that supports his claim of conspiracy.

IT IS, THEREFORE, HEREBY ORDERED THAT, the motion for summary judgment (#177) is **GRANTED**. The clerk shall enter judgment accordingly.

DATED: July 3, 2002

"s/EDWARD C. REED"
EDWARD C. REED
UNITED STATES DISTRICT JUDGE

APPENDIX I – JUDGMENT OF THE UNITED STATES COURT, DISTRICT OF NEVADA ENTERED JULY 8, 2002 – Docket No. 233

CASE NO. CV-N-99-0386
HON. EDWARD C. REED, JR.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RICHARD W. LEWIS,
Plaintiff,

v.

ELIZABETH RICHITT, PhD., et.al.
Defendants,

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT THE MOTION FOR SUMMARY JUDGMENT (#177) IS GRANTED.

DATED: July 8, 2002

LANCE W. WILSON
Clerk

"s/OMA L. ROSE"
OMA L. ROSE
Deputy Clerk

APPENDIX J – ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEVADA FILED JULY 5, 2002 – Docket No. 231

CASE NO. CV-N-99-0386
HON. EDWARD C. REED, JR.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

RICHARD W. LEWIS,

v.

ELIZABETH RICHITT, PhD., et.al.

MINUTES OF THE COURT

DATED: JULY 3, 2002
PRESENT: EDWARD C. REED, JR.
U.S. DISTRICT JUDGE
Deputy Clerk: Oma L. Rose
Reporter: None
Counsel for Plaintiff (s): NONE APPEARING
Counsel for Defendant (s): NONE APPEARING

MINUTE ORDER IN CHAMBERS

Defendants Tyrone and Linda Duff (hereinafter "the Duff's") filed a motion to dismiss the plaintiff's second amended complaint with prejudice for lack of jurisdiction (#224). Dr. Lewis opposed (#228), the State of Nevada filed a statement of no position (#226) and the Duff's replied (#229). The motion is denied.

Appendix J

This court has jurisdiction for cases that arise under federal law. A claim under 42 U.S.C. §1983 arises under federal law. Plaintiff sued the Duff's under section 1983 in this action because he alleges that they were part of the conspiracy to deprive him of his constitutional rights under section 1983. This court undisputably has jurisdiction over this claim.

IT IS THEREFORE HEREBY ORDERED THAT, the motion to dismiss for lack of jurisdiction (#116) is **DENIED.**

IT IS THEREFORE HEREBY FURTHER ORDERED THAT, the motion to set aside all orders and or judgment (#225) for lack of jurisdiction is **DENIED**.

LANCE S. WILSON, CLERK

"s/OMA L. ROSE"
OMA L. ROSE
Deputy Clerk

APPENDIX K – ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEVADA FILED JULY 12, 2001 – Docket #139

CASE NO. CV-N-99-0386
HON. EDWARD C. REED, JR.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

RICHARD W. LEWIS,
Plaintiff,

v.

ELIZABETH RICHITT, PhD., ET.AL.
Defendants,

MINUTE ORDER IN CHAMBER:

On May 1, 2001, defendant the State of Nevada filed a motion to dismiss (#111) on the basis that the State is not a person for purposes of 42 U.S.C. §1983, Eleventh Amendment immunity bars the suit against the State, and the State did not waive its sovereign immunity as to Richard W. Lewis's ("plaintiff") claim.

On June 8, 2001, plaintiff filed a response, indicating his agreement that the State is not a person for purpose of section 1983. On June 13, 2001, the State of Nevada filed a reply, indicating that based on that agreement, it should be dismissed, with prejudice.

Appendix K

IT IS THEREFORE HEREBY ORDERED THAT, the motion to dismiss (#111) is GRANTED. The State of Nevada is dismissed, with prejudice, from this action.

LANCE S. WILSON, CLERK

"s/ OMA L. ROSE"
OMA L. ROSE
Deputy Clerk

APPENDIX L – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DECIDED JUNE 15, 2006

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-15326
D.C. No. CV-N-99-00386-ECR
District of Nevada, Reno

DANIEL W. DUGAN,
Petitioner – Appellee,

RICHARD W. LEWIS,
Plaintiff-counter-defendant-
Appellee,

v.

DAVID ANTONUCCIO; LOUIS MORTILLARO; NEVADA PSYCHOLOGICAL EXAMINERS BOARD; DENNIS ORTWEIN; CHRISTA PETERSON; ELIZABETH RICHITT;RICHARD WEIHER,
Defendants,

And

LINDA DUFF; TYRONE DUFF,
Defendants-counter-
claimants- Appellants.

DECIDED: June 15, 2006

Appendix L

Before SCHROEDER, Chief Judge, TROTT, Circuit Judge, and RHOADES *, District Judge.

DECISION

The panel as constituted above has voted to deny the petition for rehearing. Chief Judge Schroeder has voted to deny the petition for rehearing en banc and Judge Trott and Rhoades so recommend.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed.R.App.P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.

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* The Honorable John S. Rhoades, Sr., Senior United States District Judge for the Southern District of California, sitting by designation.